

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILLIE HUGH WALKER, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA, PUGET
SOUND NAVAL SHIPYARD, in their official
capacity as Plaintiff's Federal Employer, and
SECRETARY OF LABOR OFFICE OF
WORKERS' COMPENSATION PROGRAMS
in their official capacity as Administrator of a
Federal Law for Federal Employees'
employment related injuries sustained while in
the performance of a duty,

Defendants.

Case No. C07-5513RJB;
C05-5742RJB

ORDER

This matter comes before the Court on Defendants' Second Motion to Dismiss. Dkt. 15. This Court has considered the pleadings filed in support of and in opposition to this motion, and the remaining file herein.

I. FACTS

On September 24, 2007, Plaintiff filed a civil suit against the United States, the Puget Sound Naval Shipyard ("PSNS"), and the Secretary of Labor for the Office of Workers' Compensation Programs ("OWCP"). Dkt. 1. (This opinion refers to the complaint in this case as the "2007 Complaint.") Plaintiff's claims arise from his employment as a sandblaster at PSNS from 1979 to 1984, injuries he alleges he suffered as a result, and the Defendants' subsequent

1 handling of his various workers' compensation claims pursuant to the Federal Employees'
2 Compensation Act ("FECA"), 5 U.S.C. § 8128. *Id.* Plaintiff claims that Defendant OWCP's
3 failure to provide him with disability compensation was a "fraudulent act," denied Plaintiff his
4 "equal protection and procedural due process rights afforded to him by the 5th Amendment to the
5 United States Constitution," and violated FECA. *Id.* at 3. Plaintiff refers to a OWCP decision
6 issued on May 27, 2005, and a "Demand for Payment" letter Plaintiff sent on August 17, 2007 to
7 OWCP. *Id.* Plaintiff alleges that Defendant OWCP did not respond to his letter of August 17,
8 2007. *Id.*, at 5. Plaintiff seeks \$5,000,000.00 in damages. *Id.*

9 **A. REVIEW OF PRIOR LITIGATION**

10 This matter is one of several actions brought in U.S. District Court by Plaintiff against the
11 United States, its agencies, and employees regarding his employment at PSNS and the denial of his
12 FECA benefits. *See e.g. Walker v. United States Dept. of Labor, et al.*, Western District of
13 Washington cause number C96-0842JCC; *Walker v. United States, et al.*, Western District of
14 Washington cause number C97-1279JCC; *Walker v. United States, et al.*, Western District of
15 Washington cause number C03-1418RSL; *Walker v. United States, et al.*, Western District of
16 Washington cause number C05-5742RJB.

17 In May of 1996, Plaintiff filed suit in U.S. District Court under the Federal Tort Claims Act
18 ("FTCA") alleging OWCP erroneously denied his claim for benefits, committed various torts
19 including "negligence, medical malpractice, wantonness, wilfulness, and constitutional violations"
20 (Case No. C96-842). Dkt. 8-2, at 26-37. The case was dismissed for 1) lack of subject matter
21 jurisdiction due to Plaintiff's failure to file an administrative tort claim, 2) lack of subject matter
22 jurisdiction to review denial of worker's compensation benefits, and 3) a finding that his
23 constitutional claims were not cognizable under FTCA. Dkt. 8-3, at 2-3.

24 On August 4, 1997, Plaintiff filed suit under the FTCA against the United States, OWCP,
25 PSNS and various individual employees of the United States, (No. C97-1279). Dkt. 8-3, at 12-23.
26 Plaintiff's Complaint alleged that his worker's compensation claims had been denied because he
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1 was black, and therefore deprived him of his equal protection rights, and that he had been deprived
2 of due process in the denial of his claims. *Id.* The matter was dismissed upon the government's
3 motions for summary judgment because Plaintiff failed to support his equal protection claim with
4 sufficient evidence and the evidence established that he had no valid due process claim. *Id.* at 25-
5 31.

6 In June of 2003, Plaintiff again filed suit in the Western District of Washington, (No. C03-
7 1418RSL). Dkt. 8-4, at 18-25. In that matter, Plaintiff alleged in his Complaint ("2003
8 Complaint") that PSNS failed to supply him with adequate protective clothing, PSNS negligently
9 and wantonly ordered him back to work even though he had demonstrated that repeated exposure
10 was worsening his condition, and that sending him back to his regular duties constituted medical
11 malpractice. *Id.* He alleged PSNS and OWCP conspired against him to deny his worker's
12 compensation benefits. *Id.* Plaintiff alleged violations of his equal protection and due process
13 rights. *Id.* Plaintiff alleged that OWCP's denial of his claims amounted to fraud. *Id.* The action
14 was dismissed because: 1) Plaintiff's claims under the FTCA were not properly exhausted and
15 they were barred by the exclusive remedy provision of the FECA, 2) Plaintiff failed to allege
16 sufficient facts to support his fraud or civil conspiracy claims, 3) the United States did not waive
17 sovereign immunity and so any monetary damages asserted for alleged violations of his equal
18 protection or due process rights would be barred, and 4) lack of subject matter jurisdiction to
19 review the merits of his worker's compensation claim. Dkt. 8-5, at 24-27.

21 On November 14, 2005, Plaintiff filed a civil suit against the United States, PSNS, and the
22 OWCP. *Walker v. United States, et al.*, Western District of Washington Cause number 05-
23 5742RJB. Plaintiff's Complaint ("2005 Complaint") indicated that at some time during his
24 employment he was placed on light duty, but was ordered to return to his regular duties in
25 February of 1983. Dkt. 8-9, at 2. Plaintiff's 2005 Complaint alleged that as a result of having
26 contact "with offending agents" he "sustained an allergic sensitization injury and disease, which
27 from February 1983 through July 1983 caused Plaintiff's eczema, asthma and urticaria injuries,
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1 along with allergy to molds, pollens and latex injury, while in performance of his duties as a
2 sandblaster for Defendant PSNS.” *Id.* at 4. Plaintiff claimed, in his 2005 Complaint, that as a
3 result of being ordered back to his regular duties, Defendants violated his “equal protection and
4 due process rights because the Plaintiff was denied of his rights to receive reasonable
5 accommodation for his said physical handicaps and work restrictions, in clear violation of Section
6 501 of the Rehabilitation Act of 1973.” *Id.* at 6. Plaintiff further alleged that his equal protection
7 and due process rights, and FECA were violated when Defendant OWCP denied his “employment
8 related urticaria and allergy to molds, pollens and latex claims” due to lack of medical evidence.
9 *Id.* at 6, 8. Plaintiff alleged that OWCP’s decision, in January of 2004, to designate his
10 “employment related asthma claim” a “temporary aggravation” violated his equal protection and
11 due process rights, and FECA, because there was medical evidence to the contrary. *Id.* at 10.
12 Plaintiff also made allegations regarding the manner in which the Defendants were processing his
13 FECA claims. For example, Plaintiff alleged that Defendant PSNS’s failure to timely complete a
14 worker’s compensation form in June of 2004, violated his equal protection and due process rights.
15 *Id.* at 11.

17 On July 18, 2006, Plaintiff’s claims in the 2005 Complaint relating to events occurring
18 before April 28, 2004 were dismissed with prejudice because they were barred by *res judicata*.
19 Dkt. 8-9, at 15. (April 28, 2004 was the date cause number C03-1418RSL was dismissed.) All
20 non-constitutional claims in the 2005 Complaint relating to events occurring after April 28, 2004
21 were dismissed with prejudice because Plaintiff had not exhausted his administrative remedies as
22 required by the FTCA, and because federal court review of the merits of Plaintiff’s FECA claim is
23 generally precluded by 5 U.S.C. § 8128. *Id.*, at 6 (*citing Rodrigues v. Donovan*, 769 F.2d 1344
24 (9th Cir. 1985)). However, because the Ninth Circuit has determined that federal courts do retain
25 jurisdiction to review substantial constitutional claims relating to the denial of FECA benefits, *See*
26 *Rodrigues* at 1348, Plaintiff’s constitutional claims in the 2005 Complaint, based on events
27 occurring after April 28, 2004, were dismissed without prejudice. *Id.* (The Court found that
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1 Plaintiff failed to allege sufficient facts to support those claims). Plaintiff was given fourteen days
2 to amend his 2005 Complaint upon the following narrowly drawn grounds: “facts which have
3 arisen after the April 28, 2004 order dismissing his 2003 case, which Plaintiff alleges support
4 substantial constitutional violations in the denial of his FECA benefits.” *Id.*, at 7. Plaintiff was
5 cautioned that monetary damages would be barred as a matter of law for claims that his
6 constitutional rights were violated in the denial of his FECA claim, as the United States and its
7 agencies have not waived their sovereign immunity from lawsuits seeking money damages for
8 constitutional violations in this context. *Id.* (citing *Daly-Murphy v. Winston*, 837 F.2d 348, 356
9 (9th Cir. 1987)).

10 Plaintiff filed an Amended Complaint on July 27, 2006 (“2005 Amended Complaint”).
11 Dkt. 8-9, at 25. Plaintiff’s claims arose from two written decisions by OWCP. *Id.* The first is a
12 letter dated January 30, 2004, which opened Plaintiff’s employment related asthma injury claim,
13 but only for temporary aggravation and not for permanent disability. *Id.* at 26-7. The second
14 decision, dated May 27, 2005, was a determination that Plaintiff was not disabled and was not
15 entitled to wage compensation. *Id.* Plaintiff’s 2005 Amended Complaint stated that: 1) OWCP
16 “denied him of his equal protection rights guaranteed by U.S.C.A. [sic] Const. Amend. 14, by
17 concluding that their correspondence dated January 30, 2004 was not intended as, nor does it
18 constitute a decision, causing Plaintiff to be denied of his right to file an Appeal,” 2) OWCP’s May
19 27, 2005, decision to deny Plaintiff’s FECA claim for benefits “denied Plaintiff of his equal
20 protection rights guaranteed by U.S.C.A. [sic] Const. Amend. 14, because Plaintiff had provided
21 said defendant with a medical report dated June 8, 2004” which indicated he was disabled, and 3)
22 OWCP committed fraud against Plaintiff “when stating in their decision dated May 27, 2005, that
23 at the time of Plaintiff’s termination his employing agency was providing him light duty for his
24 work injury” and
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26 When stating in their decision dated May 27, 2005, that he have [sic] not provided
27 any evidence that his employing agency committed any error or abuse in his case,
28 because the Plaintiff had provided said defendant with two medical reports But
because of Plaintiff’s race (Black), said Defendant so negligently, wantonly or

1 willfully concluded that Plaintiff have not provided them with any evidence that his
2 employing agency had committed any error or abuse in his case.

3 *Id.* Plaintiff sought \$5,000,000.00 dollars in damages. *Id.*

4 On October 6, 2006, this Court granted Defendants' Motion to Dismiss the Amended
5 Complaint in C05-5742RJB. Dkt. 8-9, at 33. Claims related to events prior to the April 2004
6 dismissal were again dismissed with prejudice as barred by *res judicata*. *Id.*, at 37. Claims not
7 based on the constitution and related to events after April 2004 were dismissed because the Court
8 lacked jurisdiction to review the merits of the claims and Plaintiff failed to exhaust his
9 administrative remedies. *Id.* Plaintiff's equal protection and due process claims, based on the
10 denial of benefits after April 2004, were dismissed without prejudice for failing to allege sufficient
11 facts to support his claims. *Id.*, at 38-39. The final judgment was entered on October 17, 2006.
12 The United States Court of Appeals for the Ninth Circuit summarily affirmed this Court's
13 judgment. Dkt. 8-9, at 47-48.

14 **B. PROCEDURAL HISTORY OF CURRENT LITIGATION**

15 On December 20, 2007, Defendants' motion for the dismissal of Plaintiff's 2007 Complaint
16 was granted, in part, and denied, in part. Dkt. 14. All Plaintiff's claims in the 2007 Complaint
17 were dismissed with prejudice as barred by *res judicata*, except Plaintiff's constitutional claims
18 based upon events occurring since April 28, 2004. *Id.* Plaintiff did not clearly move to amend his
19 2007 Complaint, but his pleadings referenced "reopening" his 2005 case. *Id.* Plaintiff was
20 reminded that if he intended to amend his complaint he must do so in accordance with the Federal
21 Rule of Civil Procedure and Local Rules. *Id.* Plaintiff's Motion for Reconsideration of the
22 December 20, 2007 order was denied. Dkt. 17.

24 **C. PENDING MOTIONS**

25 Defendants now move for the dismissal of Plaintiff's remaining constitutional claims,
26 arguing that: 1) the facts that Plaintiff has asserted amount to nothing more than allegations that
27 his claims for FECA benefits should have been approved, and this Court lacks jurisdiction to
28 review determinations under FECA, 2) Plaintiff has not alleged a factual basis for his constitutional

1 claims, and 3) the Court lacks jurisdiction to consider Plaintiff's claims for monetary relief because
2 the United States has not waived sovereign immunity. Dkts. 15 and 19.

3 Plaintiff files a pleading entitled "Plaintiff's Second Motion to Deny the Defendants' Second
4 Motion to Dismiss." Dkt. 18. This pleading should be construed, in part, as Plaintiff's Response
5 to Defendants' Second Motion to Dismiss. *Id.* Plaintiff argues that: 1) the "medical evidence of
6 the record in this action support [sic] Plaintiff's substantial constitutional claims relating to the
7 denial of his said FECA benefits," 2) this Court mistakenly ruled on July 18, 2006 that Plaintiff
8 could not make substantial constitutional claims predicated on events before April 28, 2004, and 3)
9 he disputes "the finality of all of the Court's prior judgments" because all the prior actions were
10 dismissed on "technicalities." Dkt. 18. In that same pleading, Plaintiff moves "the Court to
11 remove the res judicata rules from all his prior actions regarding his said substantial constitutional
12 claims relating to the denial of his said FECA benefits from its prior orders entered on July 18,
13 2006 and December 20, 2007." *Id.* at 4.

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15 Plaintiff also moves for the "right to amend his above-entitled action." *Id.* at 4-5. In their
16 Reply, Defendants argue that Plaintiff has failed to provide a factual basis for his constitutional
17 claims. Dkt. 19. Plaintiff filed a supplemental pleading in which he argues that the Court should
18 deny Defendants' Motion as it applies to his constitutional claims because the medical evidence
19 supports his claim. Dkt. 20. Plaintiff argues that Defendants committed several "fraudulent" acts
20 against him in the denial of his "accepted employment related asthma injury and disease claim
21 brought under the FECA." *Id.* Plaintiff moves to amend his 2007 Complaint to include those
22 claims. *Id.*

23 **II. DISCUSSION**

24 **A. STANDARD**

25 Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable
26 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
27 *Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as
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admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)(*internal citations omitted*). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

B. MOTION TO DISMISS

1. Jurisdiction to Review FECA Claims

Federal court review of the merits of Plaintiff's FECA claim is generally precluded by 5 U.S.C. § 8128(b). *See Rodrigues v. Donovan*, 769 F.2d 1344 (9th Cir. 1985). Under 5 U.S.C. § 8128(b), a decision by the Secretary of Labor (or his designee) in allowing or denying payment is not subject to review by another official of the United States or by a Court by mandamus or otherwise. The Ninth Circuit has determined that federal courts do retain jurisdiction to review substantial constitutional claims. *See Rodrigues* at 1348.

To the extent that Plaintiff is attempting to urge the Court to overturn the Defendants' denial of benefits on what are functionally non-constitutional grounds, his claims should be dismissed because the Court has no jurisdiction upon which to act. Plaintiff repeatedly points to medical evidence and argues that he was improperly denied benefits. Dkt. 18 and 20. To the extent that his arguments, in essence, are a plea for the Court to review the merits of Plaintiff's FECA claim on non-constitutional grounds, the Defendants' Motion should be granted and Plaintiff's claims dismissed.

2. Sufficiency of the Factual Allegations to Support Equal Protection and Due Process Claims

To establish a violation of equal protection, a plaintiff must show that he or she received

1 treatment invidiously dissimilar to that received by others outside of his protected class. *See*
2 *Divers v. Dept. of Corrections*, 912 F.2d 191, 193 (8th Cir. 1990). In addition, a Plaintiff must
3 demonstrate that defendants acted with the intent to discriminate. *Sischo-Nownejad v. Merced*
4 *Community College Dist.*, 934 F.2d 1104, 1112 (9th Cir. 1991). Plaintiff does not allege adequate
5 facts in his 2007 Complaint to support his equal protection claim. Plaintiff merely states that his
6 equal protection rights were violated. Dkt. 1. Accordingly, Plaintiff's equal protection claim
7 should be dismissed.

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9 Plaintiff's due process claim should also be dismissed. FECA establishes a comprehensive
10 and exclusive workers' compensation scheme for federal employees. *Markham v. United States*,
11 434 F.3d 1185, 1187 (9th Cir. 2006). Claims of entitlement to federal disability payments are a
12 government created property interest. *Raditch v. United States*, 929 F.2d 478, 480 (9th Cir.
13 1991). "When a government-created property interest is at stake, due process principles require at
14 least notice and an opportunity to respond in some manner, whether in writing or at an oral
15 hearing, before termination of that interest." *Id.*

16 Plaintiff fails to allege sufficient facts in his 2007 Complaint to support his due process
17 claim. He alleges that the medical evidence establishes he is entitled to benefits and Defendants'
18 denial violated his due process rights. Dkts. 1, 18, and 20. This argument reaches neither of the
19 cores of due process (notice and the opportunity to be heard), but only challenges Defendants'
20 findings.

21 Plaintiff's vague allegations of constitutional violations, without more, provide no basis for
22 this Court to review the merits of his workers' compensation claims.

23 3. Monetary Relief

24 Although Plaintiff was cautioned in the prior order dismissing his first complaint that
25 monetary damages were not available where the United States and its agencies have not waived
26 sovereign immunity, he requested \$5,000,000.00 in damages in his Complaint. Dkt. 1, at 5.
27 Plaintiff has failed to cite to any evidence that the Defendants here have waived their sovereign
28 immunity, or any authority which indicates that he is entitled to monetary relief. Defendants'

1 motion to dismiss the portion of Plaintiff's Complaint which seeks \$5,000,000.00 in damages
2 should be granted.

3 **C. MOTION FOR RECONSIDERATION**

4 To the extent Plaintiff is moving for reconsideration of the December 28, 2007, order
5 dismissing all Plaintiff's claims with prejudice as barred by res judicata, except Plaintiff's
6 constitutional claims based upon events occurring since April 28, 2004, his motion should be
7 denied. Local Fed. R. Civ. P. 7(h) provides, in relevant part, as follows:

8 Motions for reconsideration are disfavored. The court will ordinarily deny such motions in
9 the absence of a showing of manifest error in the prior ruling or a showing of new facts or
10 legal authority which could not have been brought to its attention earlier with reasonable
diligence.

11 Plaintiff failed to meet his burden under Local Rule CR 7(h)(1). Plaintiff did not show a manifest
12 error in the prior rulings, or new facts or legal authority which could not have been brought to the
13 Court's attention earlier with reasonable diligence. Plaintiff simply repeats his earlier arguments.
14 Plaintiff's Motion for Reconsideration, as it relates to the December 28, 2007 order, should be
15 denied.

16 To the extent that Plaintiff is moving for reconsideration of the orders issued in the 2005
17 case (C05-5742RJB), Plaintiff's motion should be denied. Plaintiff has not complied with the
18 procedural requirements of Local Fed. R. Civ. P. 7(h)(2), which requires that a motion for
19 reconsideration be "filed within ten judicial days following the order to which it relates." More
20 importantly, Plaintiff appealed the decisions of this Court in the 2005 case to the U.S. Ninth
21 Circuit Court of Appeals, and did not prevail. Dkt. 8-9, at 47-48. His motion for reconsideration,
22 as to any of the orders in the 2005 case, should be denied.

24 **D. MOTION TO AMEND**

25 Fed. R. Civ. P. 15(a)(1) permits a party to amend the complaint before being served with a
26 responsive pleading; or within 20 days after serving the pleading if a responsive pleading is not
27 allowed and the action is not yet on the trial calendar. In all other cases, Fed. R. Civ. P. 15(a)(2)
28 provides that "a party may amend its pleading only with the opposing party's written consent or the

1 court's leave. The court should freely give leave when justice so requires.” “Five factors are taken
2 into account to assess the propriety of a motion for leave to amend: bad faith, undue delay,
3 prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously
4 amended the complaint.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004)(*internal*
5 *quotations and citations omitted*).

6 Plaintiff’s motion should be denied for both procedural and substantive reasons. As to the
7 procedural basis for denying Plaintiff’s motion, his pleading, “Plaintiff’s Second Motion to Deny
8 the Defendants’ Second Motion to Dismiss” (Dkt. 18) is not captioned in accord with the Local
9 Rule, nor does it contain a noting date, if he intends this pleading to be his motion to amend his
10 2007 Complaint. Local Fed. R. Civ. P. 7(b)(1) provides that “all motions shall include a caption”
11 and “the date the motion is to be noted for consideration.” Motions to amend pleadings are to be
12 noted no earlier than seven judicial days after filing. Local Fed. R. Civ. P. 7(d)(2). Plaintiff has
13 been admonished by this court on several occasions, including in the 2005 case and in the present
14 litigation, to follow the Local and Federal Rules when he moves the Court for relief. Dkts. 8-9, at
15 15; 8-9, at 33, and 14.

17 Turning to the substance of Plaintiff’s motion, the five factors related in *Johnson* favor a
18 denial of his motion to amend. The first factor to be considered in whether to permit amendment,
19 the Plaintiff’s bad faith, favors denial of the motion. In the circumstances, Plaintiff gives the Court
20 no choice but to construe his current motion to amend as an act in bad faith. Plaintiff fails to
21 attach a proposed Amended Complaint, however, in discussing his desire to amend his 2007
22 Complaint, Plaintiff does reference “fraud acts” related to Defendants May 27, 2005 letter and
23 other documents sent by Defendants to Plaintiff. Dkts. 18 and 20. Plaintiff has now had several of
24 his 2007 claims dismissed with prejudice, including his fraud, FECA, and constitutional claims
25 based upon events prior to April 28, 2004. Dkt. 14. These claims were held to be barred by res
26 judicata. *Id.* Plaintiff has also been warned repeatedly (in this litigation and in the 2005 litigation)
27 that if he moves to amend his complaint, he should limit his claims to constitutional claims based
28 on events occurring after the April 28, 2004 dismissal of the 2003 case. *Id.* The December 2007

1 order also warned Plaintiff that if he chooses to amend his complaint and alleges fraud claims,
2 FECA claims, or constitutional claims based on facts occurring before April 28, 2004, he runs a
3 high risk of incurring sanctions pursuant to Rule 11. *Id.* Plaintiff was strongly cautioned to avoid
4 filing anything which was frivolous or is intended to harass others in violation of Fed. Civ. R. Pro.
5 11. *Id.* Plaintiff was warned that sanctions for violating Rule 11 include the imposition of fines or
6 dismissal of the case with prejudice. *Id.* Plaintiff was also told that he should be aware that the
7 Court has inherent power to “regulate the activities of abusive litigants by imposing carefully
8 tailored restrictions under the appropriate circumstances.” *Id.* (citing *DeLong v. Hennessey and*
9 *Mansfield*, 912 F.2d 1144, 1147 (9th Cir. 1990)). Plaintiff has disregarded the multiple warnings
10 of the Court. He has continued to file pleadings which have no basis in law or fact. A complaint is
11 frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*, 745 F.2d 1221, 1228
12 (9th Cir. 1984). The first factor, whether the moving party is acting in bad faith, favors denial of
13 Plaintiff’s motion.
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15 The second factor, undue delay, also favors denial of the motion. Plaintiff has been
16 litigating this matter for years. He has alleged several different theories of recovery, each of which
17 has failed. Plaintiff’s current attempt appears to be a rehashing of the same issues. Plaintiff was
18 given two opportunities to amend his complaint in the 2005 action. He was given specific
19 parameters in both the 2005 case and this case on how to proceed if he wish to amend his
20 complaint. Plaintiff continues to ignore this Court’s instructions, and has done so for over two
21 years. At this stage in this case, and considering the Plaintiff’s history in litigating these issues, his
22 motion to amend his complaint should also be denied because of undue delay.

23 The third factor, prejudice to the opposing party, favors denial of the motion. Defendants
24 have been forced to defend these cases for several years. An extraordinary amount of time has
25 been dedicated to resolving Plaintiff’s claims. Further delay in finally resolving the litigation would
26 unduly prejudice the Defendants.

27 The fourth and fifth factors, futility and the number of times Plaintiff has had to amend his
28 complaint, also favor a denial of the motion. As to the fourth factor, it appears that further

1 amendment to this 2007 Complaint would be futile. Plaintiff has been given multiple opportunities,
 2 in this and in the 2005 case, to amend his complaint in such a way as to plead enough facts to at
 3 least state a claim for which relief may be granted. Plaintiff was given the elements of his claims,
 4 but has not yet pled even the most basic of facts to support them, even given the most liberal
 5 construction. Because plaintiff filed this complaint *pro se*, the court has construed the pleadings
 6 liberally and has afforded plaintiff the benefit of any doubt. *See Karim-Panahi v. Los Angeles*
 7 *Police Dep't*, 839 F.2d 621, 623 (9th Cir.1988). It appears that Plaintiff has had many chances to
 8 amend his claims, and giving Plaintiff additional opportunities to amend his 2007 Complaint would
 9 be futile. "Futility alone can justify the denial of a motion to amend." *Johnson*, at 1077.

10 **E. CONCLUSION**

11 For the reasons stated above, Defendants' Second Motion to Dismiss should be granted.
 12 The dismissal should be with prejudice both because of the failure to plead any factual basis to
 13 support those claims, and also because no amendment can cure the failure. *Reddy v. Litton*
 14 *Industries, Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990). Plaintiff's motions for reconsideration
 15 should be denied. Plaintiff's motion to amend his 2007 Complaint should also be denied.

17 **III. ORDER**

18 Therefore, it is now **ORDERED** that:

- 19 • Defendants' Second Motion to Dismiss (Dkt. 15) is **GRANTED**, Plaintiff's Complaint is
 20 **DISMISSED WITH PREJUDICE**;
- 21 • Plaintiff's Motion for Reconsideration as it pertains to this case (Dkt. 18) is **DENIED**;
- 22 • Plaintiff's Motion for Reconsideration as it pertains to the orders in C05-5742RJB (Dkt.
 23 18) is **DENIED**;
- 24 • Plaintiff's Motion to Amend his Complaint (Dkt. 18) is **DENIED**;
- 25 • The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
 26 of record and to any party appearing pro se at said party's last known address.

1 DATED this 11th day of February, 2008.

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4 ROBERT J. BRYAN
5 United States District Judge
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